

STATE OF MICHIGAN
COURT OF APPEALS

APACHE CARPET & FLOOR COVERING,
L.L.C.,

UNPUBLISHED
April 23, 2013

Plaintiff/Counter-Defendant,

v

BANAH CORPORATION,

No. 305550
Wayne Circuit Court
LC No. 09-007559-Ck

Defendant/Counter-Plaintiff/Cross-
Plaintiff-Appellant/Cross-Appellee,

and

LIFE CHANGES DEVELOPMENT
CORPORATION,

Defendant/Cross-Defendant-
Appellee,

and

M. C. GUTHERIE LUMBER COMPANY,

Defendant/Cross-Defendant,

and

COMERICA BANK,

Defendant/Cross-Plaintiff/Third-
Party-Plaintiff-Appellee/Cross-
Appellant,

and

STEWART TITLE GUARANTY COMPANY,

Appellee,

and

DENNIS BROOKS and SARTORI
CORPORATION,

Third-Party-Defendants/Appellees,

and

ANTOINETTE DAY,

Third-Party-Defendant.

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

In this construction lien foreclosure action, defendant Banah Corporation appeals the trial court's order granting summary disposition in favor of defendant Comerica Bank, denying Banah's cross-motion for summary disposition, and releasing Banah's construction lien on the ground that it was invalid because Banah did not substantially comply with the sworn statement requirement of MCL 570.1110 of the Construction Lien Act ("CLA"). For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Banah contracted with a church organization, Life Changes Development Corporation, to serve as the contractor of a construction project for extensive improvements on the church property. The church obtained financing for the project from Comerica and granted Comerica a mortgage on the church property to secure the loan. The church failed to pay Banah's invoices and Banah discontinued work in the late summer or early fall of 2008. The church's non-payment eventually led to this litigation, which was filed in March 2009 by a carpeting subcontractor, Apache Carpet & Floor Covering, and thereafter led to the filing of numerous cross-claims and counter-claims, including a claim by Banah for foreclosure of a construction lien that it recorded on April 27, 2009, which Banah asserted had priority over Comerica's mortgage interest.

Comerica and Banah filed cross-motions for summary disposition on the issue of the validity of Banah's construction lien. The trial court denied Banah's motion and granted Comerica's motion on the ground that Banah failed to substantially comply with MCL 570.1110, which requires a contractor to provide a sworn statement of costs to the owner before commencing an action to enforce a construction lien. Accordingly, the trial court ruled that Banah's lien was invalid and ordered that it be released. The trial court also denied Banah's motion for reconsideration.

II. DISCUSSION

Banah argues that it substantially complied with the sworn statement requirement and that, therefore, the trial court erred by granting summary disposition in favor of Comerica.

The parties each sought summary disposition under MCR 2.116(C)(10). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Uniloy Milacron USA, Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012). We review a trial court's decision regarding a motion for summary disposition de novo. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010).

This appeal concerns the interpretation and application of the CLA, principally MCL 570.1110. Questions involving the interpretation and application of a statute are reviewed de novo as questions of law. *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012). When construing a statute, this Court must "give effect to the intent of the Legislature" by according "to every word or phrase of a statute its plain and ordinary meaning unless a term has a special, technical meaning, or is defined in the statute." *In re Application of Detroit Edison Co to Increase Rates*, 297 Mich App 377, 436-437; 823 NW2d 433 (2012).

MCL 570.1110 provides, in relevant part:

(1) A contractor shall provide a sworn statement to the owner or lessee in each of the following circumstances:

(a) When payment is due to the contractor from the owner or lessee or when the contractor requests payment from the owner or lessee.

(b) When a demand for the sworn statement has been made by or on behalf of the owner or lessee.

* * *

(4) A sworn statement shall list each subcontractor and supplier with whom the person issuing the sworn statement has contracted relative to the improvement to the real property. The sworn statement shall contain a list of laborers with whom the person issuing the sworn statement has contracted relative to the improvement to the real property and for whom payment for wages or fringe benefits and withholdings are due but unpaid and the itemized amount of such wages or fringe benefits and withholdings. The sworn statement shall be in substantially the following form: [see below]

* * *

(8) An owner, lessee, designee, mortgagee, or contractor may rely on a sworn statement prepared by a party other than himself or herself to avoid the claim of a subcontractor, supplier, or laborer unless the subcontractor, supplier, or laborer has provided a notice of furnishing as required under section 109 or unless the notice of furnishing is excused under section 108 or 108a.

(9) If a contractor fails to provide a sworn statement to the owner or lessee before recording the contractor's claim of lien, the contractor's construction lien is not invalid. However, the contractor is not entitled to any payment, and a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien, until the sworn statement has been provided.

Subsection (4) provides a sample format of a sworn statement. The contractor must include a legal description of the property involved, and must list each subcontractor, supplier, and laborer for whom payment of compensation is due but unpaid, and the amounts due these persons as of the date of the statement. For each subcontractor, supplier, or laborer, the contractor must state the type of improvement furnished, the total contract price, the amount already paid, and the amount currently owing. For laborers, the contractor also must list the amount of wages due but unpaid and the amount of fringe benefits and withholdings due but unpaid.

Additionally, MCL 570.1117(7) provides:

In an action brought by a contractor or subcontractor to enforce a construction lien through foreclosure, the complaint, cross-claim, or counterclaim must show that the owner or lessee was provided a sworn statement, if a sworn statement was requested or required, pursuant to section 110.

It is undisputed that Banah failed to provide a sworn statement until September 2010, as Comerica was preparing to file its motion for summary disposition. Banah contends, however, that the September 2010 sworn statement, and an unsworn "cost list" previously produced in March 2010 during the deposition of Banah's president, Bradley Robinson, constitute substantial compliance with the statute. Banah relies on MCL 570.1302(1), which provides:

This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

Thus, the question is whether Banah substantially complied with the sworn statement requirement of MCL 570.1110 in order to preserve its lien against Comerica. Comerica contends that subsection 1110(9) absolutely precludes Banah from filing its cross-claim for foreclosure of the lien without having first provided the sworn statement. Comerica further contends that Banah's failure to provide the sworn statement within one year of recording its construction lien precludes Banah from enforcing the lien pursuant to MCL 570.1117(1), which states that "[p]roceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded." Banah contends that "substantial compliance" is sufficient, and that it did so by providing a cost list during Robinson's deposition and by providing the sworn statement before Comerica moved for summary disposition.

In *Vugterveen Sys v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997), our Supreme Court summarized the policy goals of the CLA as follows:

This act was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs. . . . The act is to be liberally construed to effectuate these purposes. MCL 570.1302(1). Further, substantial compliance is sufficient to meet the provisions of part one of the act. . . . However, the act's clear and unambiguous requirements should not be ignored. . . .

The act is based on an exchange of information between the owner of the property, the general contractor, subcontractors, material suppliers, and laborers. . . . The act creates this flow of information through a series of documents that provide the information necessary to allow the parties to protect their interests. . . . [Citations omitted.]

Regarding a contractor's sworn statement of costs to the owner, the Court stated:

The act also provides owners with information by requiring general contractors and subcontractors to make sworn statements itemizing their bills. MCL 570.1110. . . . A general contractor must provide the owner with such a statement when payment is due or demanded, and whenever such a statement is demanded by the owner. MCL 570.1110(1). The subcontractor must provide a statement to the owner only when demanded, but must provide the general contractor with a sworn statement when payment is demanded. MCL 570.111(2), (3). Thus, the owner can rely on a sworn statement as a comprehensive list of potential lien claimants. [*Id.* at 123 (citations omitted).]

The issue presented in *Vugterveen* involved a subcontractor's failure to provide a timely notice of furnishing, which is not at issue here.

In *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc*, 461 Mich 316; 603 NW2d 257 (1999), our Supreme Court addressed whether the plaintiff subcontractor's construction lien was enforceable when the lien was recorded outside the 90-day limitations period provided by MCL 570.1111(1). With regard to the "substantial compliance" provision, the Court stated that "[a]s an exception, this provision should not be interpreted to nullify altogether the general rule that statutes should be interpreted consistent with their plain and unambiguous meaning." *Id.* at 321. Considering the proper application of the substantial compliance provision to the 90-day filing requirement, the Court stated:

The scope of a statutory "substantial compliance" provision requires an analysis, on a case-by-case basis, of the following logically relevant factors among others: the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a "substantial compliance clause"; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes "substantial compliance" within a particular context; and, of course, the specific language of the "substantial compliance" and other provisions of the statute. [*Id.* at 321-322.]

The Court observed that the policy objectives of the 90-day limitations period were to avoid uncertainty in land titles by providing notice to owners and subsequent purchasers that properties were at risk of foreclosure. The Court opined that if the 90-day filing period were not enforced, “certainty of title could only be achieved by researching the complete history of improvements with respect to a particular parcel of property and painstakingly obtaining waivers of lien from each contractor, subcontractor, materials supplier, and laborer.” *Id.* at 322. The Court also remarked that the statute imposed a specific requirement of filing the lien within 90 days, and specifically stated that the lien “cease[s] to exist” if not recorded as of the 90-day deadline. *Id.* at 322. The Court concluded that the substantial compliance issue was “a clear instance in which the Legislature could not have imposed a more precise requirement” by plainly stating, without qualification, in MCL 570.1111(1), “that a subcontractor’s right to a lien ceases to exist if not recorded in the county office of the register of deeds within ninety days after the last furnishing of labor or material. *Id.* at 323-324.

The case most similar to the case before us is *Alan Custom Homes, Inc v Krol*, 256 Mich App 505; 667 NW2d 379 (2003), in which the plaintiff contractor filed a construction lien against the defendant homeowner after the homeowner locked the plaintiff out of the worksite and refused payment. The homeowner maintained that the plaintiff breached the cost-plus construction contract by failing to complete the house in a timely manner. *Id.* at 507. The trial court granted summary disposition for the plaintiff and foreclosed on the construction lien. The defendant argued on appeal that the construction lien was invalid because the plaintiff failed to provide a sworn statement pursuant to MCL 570.1110(8). This Court quoted our Supreme Court’s decision in *Vugterveen* for the proposition that the CLA “was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs,” and that the CLA must be “liberally construed to effectuate these purposes.” *Alan Custom Homes*, 256 Mich App at 508, quoting *Vugterveen*, 454 Mich at 121 (internal quotations omitted). This Court ruled that the plaintiff substantially complied with the requirements of MCL 570.1110, stating:

In this case, application of the CLA’s “substantial compliance” provision supports plaintiff’s contention that its provision of unverified statements to the title company during construction and of a verified sworn statement to defendants before the summary-disposition hearing satisfied the notice requirement of MCL 570.1110(8). The purpose of the contractor providing the property owner with a sworn statement is “to enable the homeowner ‘to retain out of any money due or to become due to the contractor an amount sufficient to pay the subcontractors. . . .’” *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 399 n 5; 594 NW2d 81 (1999), quoting *Nurmi v Beardsley*, 275 Mich 328, 329; 266 NW 368 (1936). That a statement is not sworn before a notary does not defeat the notice purpose of the statement. It still gives the owner notice of who the subcontractors are and the amount owing to each for the materials and labor supplied.

Therefore, we find that the unverified statements plaintiff gave to the title company to obtain draws substantially complied with the statutory notice requirement of MCL 570.1110(8). Moreover, we find that although plaintiff filed the present cause of action, including its claim for foreclosure of the lien, before giving defendants a verified sworn statement, plaintiff’s provision of the verified

sworn statement to them in February 2001, before the summary-disposition hearing was held, also constituted substantial compliance with MCL 570.1110(8). [*Alan Custom Homes*, 256 Mich App at 510-511.]

Comerica argues that *Alan Custom Homes* is distinguishable because the contractor in that case substantially complied with the CLA by providing what Comerica describes as a “sworn statement without notarization” within the one-year limitations period, and before litigation was commenced. Comerica emphasizes that here, Banah failed to provide a sworn statement, notarized or otherwise, before the litigation was commenced. In *Alan Custom Homes*, the plaintiff contractor submitted unverified statements to the title company before commencing litigation, and later provided the verified sworn statement before the summary disposition hearing. *Id.* at 510-511. Banah interprets *Alan Custom Homes* as approving various other means of substantially complying with MCL 570.1110, including its presentation of an unsworn statement during discovery and submission of the sworn statement before Comerica moved for summary disposition.

The salient distinction between this case and *Alan Custom Homes* is that the contractor in *Alan Custom Homes* provided the title company with unverified statements *before* commencing litigation against the defendant homeowners. The contractor thus provided notice to the owners, albeit not in strict compliance with the statute. Here, Banah did not produce any sort of statement in compliance with MCL 570.1110(3) and (9) until after this litigation entered the discovery stage. With respect to the relevant factors stated in *Northern Concrete Pipe*, 461 Mich at 321-322, the trial court correctly ruled that Banah did not substantially comply with the sworn statement requirement. The purpose of the sworn statement requirement is to provide the owner with reliable information concerning potential lien claimants. *Vugterveen Sys*, 454 Mich at 123. Waiting until after litigation has proceeded to the discovery stage does not provide the owner or some other party with a property interest, such as a mortgage-holder, with this reliable information. Allowing belated sworn statements to satisfy the statutory requirement diminishes the clarity of MCL 570.1101, and creates the potential for prejudice and unfairness because the owner cannot rely on the sworn statement as a defense to a construction lien. Banah emphasizes that this concern is not relevant here, because the amount owed to it by the church has never been disputed, and the church allowed a default judgment to be entered against it. However, “the interests of future litigants and the public” is clearly better served by eliminating the potential prejudice that could arise if contractors waited until after litigation begins before supplying a sworn statement or its functional equivalent. *Northern Concrete Pipe*, 461 Mich at 321-322.

Consideration of “the extent to which a court can reasonably determine what constitutes ‘substantial compliance’ within a particular context” weighs against holding that a post-litigation statement constitutes substantial compliance. In *Alan Custom Homes*, this Court was satisfied that the owner had notice of the contractor’s charges because the contractor submitted unverified statements to the title company before initiating litigation. The purpose of serving sworn statements was satisfied, notwithstanding the absence of strict compliance. Delaying the statement until after litigation begins does not provide the owner with relevant information that could help avoid litigation or end it quickly.

Under these circumstances, it would be unsound to extend the holding of *Alan Custom Homes* to hold here that a contractor substantially complies with MCL 570.1110 by providing an

unsworn statement after litigation has begun, and providing the sworn statement at the summary disposition phase. We acknowledge that this Court stated in *Alan Custom Homes*, 256 Mich App at 511, that the “plaintiff’s provision of the verified sworn statement to them in February 2001, before the summary-disposition hearing was held, *also* constituted substantial compliance with MCL § 570.1110(8)” (emphasis added). However, this statement and interpretation are dicta because *Alan Custom Homes* did not involve a situation in which no statement was provided until after litigation was commenced.

Accordingly, we hold that the trial court correctly granted Comerica’s motion for summary disposition on the basis that Banah failed to substantially comply with the sworn statement requirement.

Banah also argues that the trial court erred in denying its motion for reconsideration. This Court reviews a trial court’s decision on a motion for reconsideration for an abuse of discretion. *Luckow Estate v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011). A motion for reconsideration should generally be granted only if the moving party demonstrates a palpable error by which the court and the parties have been misled and shows that a different disposition must result from correction of the error. MCR 2.119((F)(3)). Banah’s motion was based on its purportedly new argument that it substantially complied with MCL 570.1110. Banah maintains that it did not have the opportunity to develop its argument that it complied with the sworn statement requirement because Comerica did not assert the sworn statement requirement as a basis for summary disposition until it responded to Banah’s motion for summary disposition. However, Comerica argued in its own motion for summary disposition that Banah’s action to enforce a construction lien was invalid because Banah failed to provide the sworn statement in accordance with MCL 570.1110. The trial court decided that issue when it decided the cross-motions for summary disposition and granted judgment for Comerica. Banah’s failure to present its alternative argument regarding the unsworn statement produced during Robinson’s deposition in March 2010 until it moved for reconsideration did not establish a palpable error by which the court and the parties were misled. Further, as discussed, Banah failed to show that a different disposition must result from a consideration of that argument. Accordingly, the trial court did not abuse its discretion in denying Banah’s motion for reconsideration.

In light of our decision, it is unnecessary to consider the parties’ additional arguments concerning whether Banah’s construction lien was timely recorded under MCL 570.1111(1), and whether Banah would be entitled to attorney fees and interest if it were the prevailing party.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad